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In the Supreme Court of the United States

OCTOBER TERM, 1975

EDWARD WRAY CROCKETT, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that they were denied a fair trial when an attorney for several co-defendants, including two of the petitioners, testified as a government witness and temporarily invoked the constitutional privilege against self-incrimination; that the district court in its charge to the jury impermissibly directed a partial verdict of guilty; and that Wharton's Rule precludes an indictment for conspiracy to violate 18 U.S.C. 1955.

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners Edward Wray Crockett, Jr., and Pleasant Henry Partin were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and for conspiring to do so, in violation of 18 U.S.C. 371. Crockett, Jr., was sentenced to concurrent five year terms of imprisonment; Partin was sentenced to concurrent three year terms. Petitioners Edward Wray

Crockett, III, Marcus Randolph Martin, and Edwin Eugene Brown were each convicted of the substantive offense alone; the former was sentenced to three years' probation and a fine of $3,000; the latter two were each sentenced to imprisonment for one year and one day.[1] The court of appeals affirmed all the convictions (Pet. App. 1a-9a; 506 F.2d 759).

The government's evidence established that a sizeable, illegal gambling business was being operated at the Eagles Club in Valdosta, Georgia. Between January 23 and February 27, 1973, Agent George Kenney of the FBI, acting in an undercover capacity, visited the Club to observe the gambling and identify the employees of the Club and their roles in the gambling operation (II Tr. 6-7). At the Club he saw blackjack, poker, "beat-my-shake," "chuck-a-luck," and craps games being conducted both in the main Club building and in a nearby house directly behind the main house (*id.* at 13-14, 44-45). He also saw petitioners Partin, Martin, and Crockett, III, act as dealers in the blackjack games (*id.* at 51-61; 131) and petitioner Brown assist Partin in collecting chips for making payouts to winners in a "beat-my-shake" game (*id.* at 157-161). And he saw petitioners Partin and Crockett, Jr., approving personal checks for the purchase of gambling chips (*id.* at 129). At one point Agent Kenney participated in a craps game in which co-defendant Bruce Fussell stated that "no one loses at Crockett's place" (*id.* at 136). On January 30, 1973, Agent Kenney observed approximately $2,500 worth of chips purchased during a two-hour period at the Eagles Club (*id.* at 110, 116).

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[1]Six other co-defendants were indicted for both conspiracy and the substantive offense. Isaiah Ike Cumbess pled guilty; Thomas Henry DeLoach, Thomas Edward Johnson, Bruce Fussell, Janice K. McBride, and Crystal Sumiako Cannon were convicted on the substantive count only (IV Tr. 68a-69a). William Charles Steele, Jr., indicted on the substantive count only, was acquitted by the jury (*id.* at 69a).

Additional government evidence disclosed that gambling had been taking place at the Valdosta Eagles Club since 1963 (III Tr. 247). In 1970 or 1971 the Club started keeping a percentage of the money accumulated from the betting (*id.* at 249). Petitioner Crockett, III, was the president of the Club during 1970-1971 (*id.* at 258). The manager of the restaurant at the Eagles Club during the relevant period observed petitioners Partin and Crockett, III, dividing the money which had accrued from the illegal gambling (*id.* at 478-480). Penny Fennell, a friend of petitioner Crockett, Jr., testified that he told her that he was the owner of the Eagles Club, that he wanted to hire her because he thought she would be good to work the "chuck-a-luck" game, and that although he knew that the gambling operation at the Club was illegal he was not worried about it (*id.* at 531-532, 538-539).[2]

1. Petitioners contend that they were denied a fair trial by the temporary invocation of the privilege against self-incrimination by an attorney for several of the defendants, including petitioners Martin and Brown,[3] who was called to testify as a government witness. This claim was carefully considered and correctly rejected by the court of appeals. It raises no issue outside the confines of this case warranting further review.

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[2]Several customers of the Eagles Club testified about their gambling activities at the Club, the types of games offered, the procedures followed, and the amount of money lost at the Club (IV Tr. 32, 72-75, 90-95, 106, 124).

[3]The other six defendants were represented by seven other attorneys.

Counsel of record for defendants DeLoach, Martin, Brown, Johnson, Fussell, and Cannon was H. B. Edwards, III. His co-counsel and father, H. B. Edwards, Jr., who was called to testify by the government, had been a co-founder of the Valdosta chapter of the Eagles Club in 1963 and had subsequently served at different times as state trustee, state vice-president, state president, southeastern president, local president, and local secretary of the Club (III Tr. 213-214). He held the latter position during the period in which the illegal gambling existed: approximately two months prior to the defendants' indictment he had resigned the post (*ibid.*).

Edwards testified extensively about his various positions in the Eagles Club and the operations of the Club in general (III Tr. 213-241). In connection with inquiries into the Club's revenues, the prosecution asked, without objection, "What about the gambling?" and Edwards replied, "I didn't have anything to do with the gambling" (*id.* at 241). The prosecution then asked, "How long had the gambling been in the Club, Mr. Edwards?" He answered, "I used to play slot machines out there" (*id.* at 242). At this point Edwards, III, objected on the ground that the attorney-client privilege was being infringed, but Edwards, Jr., without waiting for the court's ruling, said "Well, the statute of limitations has run on the misdemeanor of playing slot machines" (*ibid.*) and continued his testimony.

The prosecution next asked (*id.* at 242-243), "Mr. Edwards, when did you first see card games of poker and blackjack and dice games out at the Eagles Club in Valdosta, Georgia?" Again Edwards, III, objected on attorney-client privilege grounds (*id.* at 245). The court allowed the question, and Edwards, Jr., responded:

> Well, your Honor, in this case, I wish to take the Fifth Amendment. Any evidence I give might incriminate me in some regard. In regard to this, I take the Fifth Amendment to the Constitution of the United States in regard to that question.

The court said, "All right. He declines to answer that." A bench conference and then a brief recess followed. When trial resumed, Edwards, Jr., offered the following statement (*id.* at 246):

> Your Honor, with your permission, and since I am an officer of the Court, I wish to withdraw my averment to the Fifth Amendment. I will answer the question. I will answer the question as long as they don't involve me in gambling because I wouldn't want to self-incriminate myself.

Edwards then testified that gambling had been going on at the Club since its founding in 1963 (*id.* at 247). He was thereafter cross-examined extensively by three other defense attorneys.

As the court of appeals noted (Pet. App. 5a), Edwards' fear of self-incrimination bore on his own involvement in the gambling operations at the Club, not on the defendants' complicity. His testimony did not directly implicate any of the defendants, and, as the court ruled, petitioners cannot show that his fleeting invocation of the constitutional privilege prejudiced them in any significant way before the jury. Edwards' testimony was "reasonably necessary," *United States* v. *Fiorillo*, 376 F. 2d 180, 185 (C.A. 2), no objection was made when he was called to the stand, and petitioners do not claim that they were unaware that he had been subpoenaed two weeks prior to trial (Supp. R. 2-3)[4] (or indeed that they did not know that he had

[4]"Supp. R." refers to the Supplemental Record forwarded to the court of appeals at the government's request.

testified several months earlier before the federal grand jury investigating the case (*ibid.*)). Under these circumstances, and given the other overwhelming evidence of petitioners' guilt, the court of appeals was correct in holding (Pet. App. 6a) that the allowance of Edwards' testimony was not prejudicial error. See *United States* v. *Fiorillo*, *supra*.

2. Petitioners contend also that the trial court improperly directed a partial verdict of guilty by charging the jury as a matter of law that the operation of a commercial gambling establishment is a violation of Georgia law.

Under 18 U.S.C. 1955 it is illegal for five or more persons to conduct, finance, manage, supervise, direct or own a gambling business that is illegal under state law and that continues in operation for a period of thirty consecutive days or has a gross revenue of $2,000 or more in any single day.[5] Under Georgia law it is illegal for any person knowingly to permit any real estate owned by him or under his control to be used as a gambling place,[6] or to be involved in commercial gambling where he intentionally operates or participates in the earnings of a gambling place or receives, records, or forwards a bet or offer to bet.[7]

After telling the jury that the Georgia Code provisions relating to gambling were lengthy and involved, the district court charged that "as a matter of law * * * the operation of a commercial gambling establishment [as defined in Section 1955] is in violation of Georgia law" (V Tr. 29a).

[5]The government's evidence established that more than five persons were involved in the operation of the gambling venture and that $2,000 in gross revenues were accrued in a single day (II Tr. 116).

[6]Ga. Code Ann. §26-2704 (1972).

[7]Ga. Code Ann. §26-2703 (1972).

The court immediately made clear, however, that "they [the prosecution] have to prove that it [the defendants' conduct] is a violation of the law of the state * * * . I expressed no opinion about this one way or the other because you are the sole judges of the facts" (*ibid.*). In short, the district court did not take away from the jury any relevant issue of fact essential in resolving the defendants' guilt or innocence. See *United States* v. *Hayward*, 420 F.2d 142, 144 (C.A. D.C.); *Carothers* v. *United States*, 161 F.2d 718, 722 (C.A. 5). Moreover, no objection was made to this aspect of the court's charge, and the court of appeals was correct in ruling that, even if the charge might have been more thorough, failure to read the Georgia code *in haec verba*[8] was not plain error. Rule 52(b), Fed. R. Crim. P.

3. Petitioners Partin and Crockett, Jr., convicted on both the substantive and conspiracy counts, contend that Wharton's Rule is a bar to an indictment for substantive violation of Section 1955 and conspiracy to commit the violation. *Iannelli* v. *United States*, No. 73-64, decided March 25, 1975, resolved this issue to the contrary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[8]The trial court is not required to define terms which are reasonably within the common understanding of a juror. *Bohn* v. *United States*, 260 F.2d 773, 779 (C.A. 8), certiorari denied, 358 U.S. 931. Here the terms "commercial gambling" (Ga. Code Ann. §26-2703(a) (1972)), "gambling" (Ga. Code Ann. §26-2702 (1972)), and "keeping a gambling place" (Ga. Code Ann. §26-2704 (1972)), are sufficiently within common understanding to preclude the necessity of definition.